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IN THE
COURT OF APPEALS OF INDIANA

MICHAEL L. DUPREE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A02-0608-CR-677
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON CIRCUIT COURT
The Honorable Fredrick R. Spencer, Judge
Cause Nos. 48C01-0405-FC-157 and 48C01-0511-FB-457

February 26, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Michael Dupree appeals his conviction for Robbery, as a Class B felony, following a jury trial in Cause Number 48C01-0511-FB-457 ("457"). Dupree also appeals the trial court's revocation of his probation in Cause Number 48C01-0405-FC-157 ("157"). He presents the following issues for our review:

1. Whether the prosecutor committed misconduct during closing argument in 457.

2. Whether the State presented sufficient evidence to support the revocation of his probation in 157.

We affirm.

FACTS AND PROCEDURAL HISTORY

On July 21, 2004, Dupree pleaded guilty to theft, as a Class D felony, and resisting law enforcement, a Class A misdemeanor, in 157. The trial court accepted the plea agreement and sentenced Dupree to three years, suspended to probation. On October 17, 2005, the State filed a notice of probation violation. During a hearing, Dupree admitted to violating the terms of his probation. The trial court revoked his probation and reinstated his three-year suspended sentence.

Meanwhile, on July 14, 2005, Dupree entered Strong's Market in Anderson and robbed the cashier at knifepoint. In 457, the State charged him with robbery, as a Class B felony, and a jury found him guilty as charged. The trial court entered judgment and sentence accordingly. This appeal ensued.

DISCUSSION AND DECISION

Issue One: Prosecutorial Misconduct

Dupree contends that the prosecutor committed misconduct in 457 when he said the following during his closing statement:

> The evidence you heard in this case came from the witnesses on that stand and the evidence that you heard has not been challenged, it's not been questioned. In fact, it is unquestioned in the way it was presented to you.
>
> * * *
>
> None of the four [witnesses] have been challenged in what they told you.
>
> * * *
>
> And the fact that he has told four different people that he did it. He has tried to get Christina Lodge to tell Desirae not to come in and tell you folks what he had told her. It all points back to him, folks. The evidence is unchallenged.
>
> * * *
>
> You've not heard one shred of evidence in this courtroom by anybody saying that that robbery didn't happen and he's the one that didn't commit it.
>
> * * *
>
> Just ignore the fact that nobody gave a motive as to why anybody would come in here and say that he said those things and he did that robbery other than the fact that it's the truth.
>
> * * *
>
> Ladies and gentlemen, I don't think there's a simpler case that you can go on. And you have words out of the defendant's own mouth convicting himself. And not one word came to you in this courtroom that disputes any of that. Not one word came from that stand that challenges any of that.

Transcript at 184, 190, 192, 203, 206-07. Dupree did not object to any of those statements, nor did he move for a mistrial.

When an improper argument is alleged to have been made, the correct procedure is to request the trial court to admonish the jury. Brewer v. State, 605 N.E.2d 181, 182 (Ind. 1993). If the party is not satisfied with the admonishment, the correct procedure is to make a motion for a mistrial. Id. Failure to request an admonishment or move for a mistrial results in waiver of the issue of improper argument. Id.

In an attempt to avoid waiver, Dupree contends that the alleged prosecutorial misconduct constitutes fundamental error. To qualify as fundamental error, "an error must be so prejudicial to the rights of the defendant as to make a fair trial impossible." Willey v. State, 712 N.E.2d 434, 444-45 (Ind. 1999) (citations omitted). Further, the error "must constitute a blatant violation of basic principles, the harm or potential for harm must be substantial, and the resulting error must deny the defendant fundamental due process." Wilson v. State, 514 N.E.2d 282, 284 (Ind. 1987).

The right to a fair trial prevents the prosecutor from urging the jury to decide the case upon improper and irrelevant reasons. Schnitz v. State, 650 N.E.2d 717, 723 (Ind. Ct. App. 1995), aff'd, 666 N.E.2d 919 (Ind. 1996). In reviewing a charge of prosecutorial misconduct, we first determine whether there was misconduct by the prosecutor, and second, consider whether that misconduct under all the circumstances placed the defendant in a position of grave peril to which he should not have been subjected. Id. (citation omitted). This position is measured by the probable persuasive effect of any misconduct on the jury's decision and whether there were repeated instances

of misconduct which would evidence a deliberate attempt to improperly prejudice the defendant. Id. (citation omitted).

Dupree asserts that the prosecutor's comments "were an improper comment on [his] failure to testify and to give an explanation for or denial of the statements attributed to him by the witnesses." Brief of Appellant at 9. In Davis v. State, 685 N.E.2d 1095, 1099 (Ind. Ct. App. 1997), we addressed a similar claim of prosecutorial misconduct and held that, while improper, it did not constitute fundamental error. In that case, an officer testified at the defendant's trial for auto theft that the defendant had told him, "I took the car." Id. at 1097. During his closing statement, the prosecutor made the following remarks: "[Davis] said he took the car. There is nothing to controvert that. There is no evidence saying that isn't so. There's not even an argument that he didn't say that." Id. at 1098. On appeal, we held:

> By calling attention to the defendant's alleged admission and pointing out that there was no claim to the contrary, the prosecutor indirectly brings to the jury's attention the fact that Davis did not deny this allegation. Davis was the only one who could have denied that this statement was made since only he and Officer Kaszas were present at the time. Thus, a reasonable jury could have taken that comment as an invitation to consider Davis' failure to testify as an inference of guilt. We conclude that the prosecutor's comments were improper.

Id.

But the defendant in Davis had not objected to the improper comments at trial. And we reiterated that where a prosecutor makes no direct reference to a defendant's decision to remain silent, but instead emphasizes the uncontradicted nature of the testimony, there is no fundamental error. Id. Further, our supreme court has stated that "if in its totality the prosecutor's comment is addressed to other evidence rather than the

defendant's failure to testify, it is not grounds for reversal." Id. at 1098-99 (quoting Hopkins v. State, 582 N.E.2d 345, 348 (Ind. 1991)). In Davis, we observed that in each of the challenged comments, the prosecutor "emphasized the lack of contradictory evidence and made no direct mention of the defendant's failure to testify." Id. at 1099. Thus, we held that Davis was not placed in grave peril by the comments. Id.

Likewise, here, the prosecutor did not make any direct references to Dupree's failure to testify, but highlighted the "unchallenged" nature of the evidence. Dupree has not demonstrated that the prosecutor's statements put him in a position of grave peril. We hold that the prosecutor's comments do not constitute fundamental error.

Issue Two: Sufficiency of the Evidence

Probation is a matter of grace, and whether probation is granted is within the trial court's discretion. Morgan v. State, 691 N.E.2d 466, 468 (Ind. Ct. App. 1998). The sole question at a probation revocation hearing is whether the probationer should be allowed to remain conditionally free or rather should be required to serve the previously imposed sentence in prison. Id. It is well settled that violation of a single condition of probation is sufficient to revoke probation. Wilson v. State, 708 N.E.2d 32, 34 (Ind. Ct. App. 1999). If the court finds that the defendant has violated a condition of his probation at any time before the termination of the probationary period, and the petition to revoke is filed within the probationary period, then the court may order execution of the sentence that had been suspended. Wilburn v. State, 671 N.E.2d 143, 147 (Ind. Ct. App. 1996), trans. denied. A revocation hearing is in the nature of a civil proceeding, so the alleged

violation need be proven only by a preponderance of the evidence. Goonen v. State, 705 N.E.2d 209, 211 (Ind. Ct. App. 1999).

Here, one of the conditions of Dupree's probation in 157 was that he not commit another crime. At the probation revocation hearing on January 9, 2006, Dupree admitted to three of the four alleged probation violations. More importantly, Dupree testified that on October 12, 2005, he had pleaded guilty to battery and resisting law enforcement. Those offenses occurred while Dupree was on probation. The evidence is sufficient to support the revocation of his probation.

Affirmed.

MAY, J., and MATHIAS, J., concur.